



**PACIFIC LEGAL
FOUNDATION**

March 16, 2020

The Honorable Russell T. Vought
Acting Director
Office of Management and Budget
Executive Office of the President

RE: Improving and Reforming Regulatory Enforcement
and Adjudication (OMB-2019-0006)

Dear Director Vought:

Russ

Pacific Legal Foundation (PLF) appreciates the opportunity to respond to OMB's Request for Information: Improving and Reforming Regulatory Enforcement and Adjudication (OMB-2019-0006). Given the harm unconstitutional regulatory procedures inflict on Americans, it is encouraging that OMB has sought information on ways to satisfy constitutional due process.

Founded in 1973, PLF is a nonprofit legal foundation organized for the purpose of engaging in litigation and advocacy in matters affecting the public interest. PLF defends the principles of liberty and limited government and is one of the most experienced public interest legal organizations defending the constitutional separation of powers in administrative investigations, enforcement actions, and related agency proceedings.

PLF's attorneys have participated as lead counsel in several successful administrative law cases before the United States Supreme Court. *See, e.g., U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

PLF's attorneys have also contributed a large body of scholarly literature on the administrative state. *See, e.g.,* Angela Erickson & Thomas Berry, *But Who Rules the Rulemakers: A Study of Illegally Issued Regulations at HHS*, Pacific Legal Foundation (April 2019), <http://bit.ly/2GJJCA8> (analyzing the lawfulness of Department of Health and Human Services regulations); John Yoo & Todd Gaziano, *Presidential Authority to Revoke or*

Hon. Russell T. Vought
March 16, 2020
Page 2

Reduce National Monument Designations, 35 Yale J. on Reg. 617 (2018) (discussing presidential authority under the Antiquities Act); Jonathan Wood, *Standing up to the Regulatory State: Is Standing's Redressability Requirement an Obstacle to Challenging Regulations in an Over-Regulated World?*, 86 U. Mo. Kan. City L. Rev. 147 (2017) (discussing the Article III standing implications of the modern administrative state); Ethan W. Blevins, *Life in the Shadow: Due Process in the World of Rule by Threat*, 27 Geo. Mason U. Civ. Rts. L.J. 1, 13 (2016) (discussing the due process implications of administrative agency threats); Damien M. Schiff & Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. L. & Pol. 97 (2013) (discussing the crushing costs the modern administrative state imposes on smaller entities).

PLF is heartened by OMB's efforts to rein in the unconstitutional excesses of the administrative state through any means, including its policy on *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*, and we are willing to help in any reasonable way we can.

For any questions or follow-up, please contact me.

Cordially,



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Improving and Reforming Regulatory Enforcement and Adjudication (OMB-2019-0006)

By Pacific Legal Foundation

I.

INTRODUCTION

PLF is dedicated to protecting ordinary Americans against the arbitrary and unjust exercise of government power. The Constitution's separation of powers is the greatest protection of our individual liberties, but it has been seriously undermined with the growth of the modern administrative state and its unconstitutional procedures and proceedings. Time-honored due process protections constitute an essential pillar of the rule of law. To protect American liberty, those due process protections must be restored in regulatory investigations, enforcement actions, and related agency adjudications.

PLF has responded to each of OMB's eleven queries listed in its request for information, and we are happy to provide additional input to OMB regarding our experiences and recommendations to fully restore Americans' fundamental due process protections.

We have sorted the eleven queries into three broad categories: (1) Reforms to investigation, enforcement, and other agency pre-adjudicative procedures (queries 1, 8, and 9); (2) Reforms to adjudicative processes (queries 4, 5, 6, and 11); and (3) Reforms to agency structures that will ensure greater due process protections in regulatory enforcement and adjudication (queries 2, 3, 7, and 10).

In our treatment of each query, we have provided three pieces of information. First, we briefly discuss the due process issues raised by the query. Second, we provide concrete examples of PLF clients who have experienced an agency investigation, enforcement action, or adjudication falling short of constitutional due process requirements. Finally, we propose concrete reforms to ensure that adequate due process is provided in each context.

In reviewing PLF's response, we hope you recognize five key takeaways: (1) the frequent arbitrariness of agency investigations and the near total discretion given to agency investigators and enforcement officers without reasonable safeguards; (2) the frequent lack of any notice regarding enforcement and investigation activity; (3) the

lack of consistent rules that can be relied upon by enforcement targets; (4) the convoluted and procedurally burdensome nature of agency adjudication and effective foreclosure of judicial review; and (5) the stunning disproportionality of penalties that can be imposed for ordinary, good faith, and even innocent conduct.

The current system forces ordinary Americans into a war of attrition. The sheer weight of what they are up against frequently pressures them to surrender their rights and comply. This is precisely why the American tradition of due process and the rule of law exists to protect against. Our proposed reforms, while specific to each query, are informed by this conclusion.

II.

INVESTIGATION AND ENFORCEMENT REFORMS (QUERIES 1, 8, AND 9)

Queries 1, 8, and 9 each raise issues pertinent to reforming investigatory, enforcement, and other pre-adjudicatory procedures.

- A. QUERY 1: Prior to the initiation of an adjudication, what would ensure a speedy and/or fair investigation? What reform(s) would avoid a prolonged investigation? Should investigated parties have an opportunity to require an agency to “show cause” to continue an investigation?**

There is often a basic “due process deficit” in federal agencies’ pre-adjudication procedures and investigatory tactics.¹ PLF has frequently witnessed significant pre-adjudicative due process shortcomings in the implementation of the Clean Water Act. However, many other regulatory schemes raise similar concerns, and the administrative “due process deficit” should be addressed via comprehensive reform.

¹ In addition to the real-world experiences of PLF’s current and former clients, this “due process deficit” has been well chronicled in the wide body of scholarly writing on the subject. See Jonathan Adler, *Wetlands, Property Rights, and the Due Process Deficit in Environmental Law*, 2012 *Cato S. Ct. Rev.* 139, 158; Ethan W. Blevins, *Life in the Shadow: Due Process in the World of Rule by Threat*, 27 *Geo. Mason U. Civ. Rts. L.J.* 1, 13 (2016); Jonathan D. Sater, Note, *Sackett v. EPA: The Murky Confluence of Due Process and Administrative Compliance Orders Under the Clean Water Act*, 7 *Liberty U. L. Rev.* 329, 367 (2013).

i. Examples of Due Process Shortfalls

Investigations by the United States Army Corps of Engineers, or the Environmental Protection Agency, for violations of the Clean Water Act highlight this pre-adjudication “due process deficit.” Under the current Clean Water Act regulatory scheme, investigations and other pre-adjudicatory procedures are often opaque, confusing, standardless, and lacking in notice. This is particularly problematic given that significant restrictions and penalties can be imposed on landowners during the pre-adjudication phase.

For example, Corps regulations allow the District Engineer to investigate violations of the Clean Water Act and to conclude whether the Act was violated. *See* 33 C.F.R. § 326. The regulations do not provide any investigation procedures or standards, and based on an often arbitrary investigation, the Army Corps has the authority to issue a cease and desist order, or order that corrective measures be taken, based only on the District Engineer’s judgment as to the likelihood of a violation. *See* 33 C.F.R. § 326(c)(1), (d). The lack of guidance in the regulations raises the very real risk of a District Engineer arbitrarily concluding the Act has been violated.

Similarly, the EPA Administrator has broad discretionary authority to issue pre-adjudicative compliance orders merely upon learning of a potential violation. *See* 33 U.S.C. § 1319(a). This is especially problematic (as our examples demonstrate), because landowners are liable for up to \$37,500 per day for violation of a compliance order. *See* 40 C.F.R. § 19.4 (Table 1).

These concerns related to issuance of pre-adjudication orders generally, along with those related to the manner in which opaque Clean Water Act investigations shortchange the due process rights of ordinary Americans, are exemplified by the following PLF client stories.²

² Note: The related due process problems raised by the overlap in enforcement authority between EPA and the Army Corps will be discussed at *infra* section IV.A in our discussion of queries 2 & 3.

1. *Smith Farm Enterprises v. EPA*³

Former PLF client Smith Farm is a family-owned company that owns a 300-acre tract of farmland and forest in the Tidewater area of Virginia. For the purpose of removing excess water from its land for future development, Smith Farm proposed digging some drainage ditches on its property.

Before beginning any work, members of the Boyd family (owners of Smith Farm) met with the Corps and revealed their proposed designs. The Corps advised the Boyds they did not need any permits for their project. Given the potentially bankrupting fines, criminal penalties, and other costs associated with inadvertent violation of the Clean Water Act, however, the Boyds asked the Corps to inspect the site, specifically to ensure that all their work would be in compliance with the law. At Smith Farm's invitation, the Corps inspected the site on five separate occasions during the course of the project. Smith Farm requested that the Corps advise it if the agency observed any problems with the project and promised to cease work if any problems arose. The Corps raised no objections on any of these visits.

However, in September 1999, after the drainage project had been completed, EPA officials chose to inspect the site again, *less than 48 hours after the area had experienced a major hurricane* and water levels were high. Nine months later, and without warning, EPA issued a compliance order to the Boyds asserting federal jurisdiction over large areas of the site and alleging multiple Clean Water Act violations. EPA then brought an administrative penalty proceeding against the family.

During the hearings and communications that followed, the Boyds learned for the first time that EPA and the Corps had been discussing their project while it was under way. Yet, despite the Boyds' good-faith reliance on agency oversight to ensure full compliance with the law, neither the Corps nor EPA advised the Boyds that they might be in violation of the Clean Water Act.

For the Boyds, the issuance of a compliance order was just the beginning of their ordeal. After the enforcement action was commenced, the case was settled via consent decree. Although the Boyds were ultimately able to pursue their subsequent development project, it came at an enormously high cost. The consent decree required

³ Note: The Boyds' treatment raises many concerns related to due process in regulatory enforcement and adjudications, and their story is featured elsewhere in this document. *See infra* section IV.A.i.

the Boyds to pay a \$10,000 civil penalty, pay for expensive onsite restoration, and grant a 330-acre conservation easement, consisting of land from the proposed development site and other nearby tracts of land.

The Boyds' example highlights the opaque nature and potential high-handedness of EPA and Corps investigations. It further highlights the manner in which agents from either agency can conclude, without adequate notice, that the Act has been violated and summarily issue an order carrying significant penalties and limitations.

2. *Sackett v. EPA*⁴

In 2005, PLF clients Mike and Chantell Sackett purchased a 0.63-acre lot in a partially built-out residential subdivision in Priest Lake, Idaho, between two residential streets. The lot was located across the street from and upland of the lakefront properties. They obtained all local permits and commenced construction of their dream home. Shortly afterwards, agents from EPA and the Army Corps came unannounced onto their property and issued a verbal stop-work order, declaring that the site contained "wetlands" regulated as "navigable waters" under the Clean Water Act.

A few months later, EPA followed up with a written compliance order. The order concluded that the Sacketts were guilty of multiple Clean Water Act violations, were liable for tens of thousands of dollars per day in civil fines, and were required to immediately embark upon a substantial onsite wetland "restoration" project. The Sacketts were given no opportunity to contest the compliance order in an agency hearing before or after the order was issued. This is yet another example of the significance of pre-adjudication orders that can be issued by the EPA or Army Corps based on little more than an opaque and oftentimes arbitrary investigation.

Former White House Counsel Don McGahn has used the *Sackett* case as an example of agency abuse in his Federalist Society Barbara Olson lecture,⁵ and for good

⁴ Note: The Sacketts' treatment raises many concerns related to due process in regulatory enforcement and adjudication, and their story will be featured further below in response to other queries.

⁵ Donald F. McGahn, II, White House Counsel, 17th Annual Barbara K. Olson Memorial Lecture at the 2017 Federalist Society National Lawyers Convention (Nov. 16, 2017),

reason. After a trip to the Supreme Court of the United States, that EPA fought at every stage, and many years more of litigation in federal courts on remand, the evidence is even stronger that that the EPA was seriously mistaken on two matters. (1) The Supreme Court definitively and unanimously ruled that the Sacketts had the right to seek judicial review of the compliance order that the EPA had sought to prevent. (2) The original wetland determination looks even more questionable in light of the Administration's Navigable Water Rule and surely cannot survive further scrutiny.

3. *Johnson v. EPA*⁶

In 2012, Wyoming farmer and former PLF client Andy Johnson built a stock pond on his property to provide safer, more reliable water access for his daughters' four horses. Working with state engineers, he designed this pond to provide numerous environmental benefits, including creating habitat for fish and wildlife and cleaning the water in a small stream that passed through the pond. Importantly, "stock ponds" are explicitly exempt from the Clean Water Act's dredge-and-fill permitting requirements. *See* 33 U.S.C. § 1344(f)(1)(C). Nonetheless, in January 2014, EPA, relying on the controversial *Rapanos* guidance, accused Johnson of violating the Clean Water Act, issuing a compliance order demanding that he remove the pond and threatening him and his family with fines of \$37,500 per day. The threatened fines ultimately reached over \$20,000,000.

After years of agency delays, and after PLF commenced litigation on Mr. Johnson's behalf, it was revealed that EPA's assertion of jurisdiction over and mistaken position on Mr. Johnson's pond was based solely on a Google Maps search connecting Mr. Johnson's property to a navigable water several hundred miles away. Part of the supposed connection flowed in the opposite direction from that which the investigator had assumed from Google. As a result of the direction of the flow, the water on the Johnsons' property never actually reached a navigable water. In 2017, President Trump cited EPA's outrageous mistreatment of the Johnsons in ordering the

<https://fedsoc.org/conferences/2017-national-lawyers-convention?#agenda-item-barbara-k-olson-memorial-lecture>.

⁶ Note: The Johnsons' treatment raises many concerns related to due process in regulatory enforcement and adjudication, and their story will be repeated below as well. *See infra* section II.B.

agency to reform its controversial “waters of the United States” (WOTUS) interpretation.

4. *Duarte Nurseries v. U.S. Army Corps of Engineers*⁷

Former PLF client John Duarte, a California farmer, hired a contractor to plow about 450 acres of his property. His intention was to grow a small winter wheat crop and some walnuts—normal farming activities. Following a short (and what now seems questionable) investigation, the Corps issued a cease and desist order to Duarte on the ground that his activity affected a number of small and isolated vernal pools.

On November 28, 2012, a Corps employee observed the plowing on Mr. Duarte’s property by one of his contractors. Instead of immediately notifying Duarte of any concerns, which should have happened if any environmental harm was at issue, the Corps employee waited almost two weeks (until December 11, 2012), by which point the work was complete and hundreds of additional acres had been plowed, with allegedly greater harm. As a result of this lack of notice, Duarte Nursery was charged with a much more serious violation involving much larger fines.

Because he was given no hearing prior to the issuance of the cease and desist order, Duarte sued the Corps to vindicate his Fifth Amendment due process rights. The Corps promptly countersued him for millions of dollars in Clean Water Act civil penalties. The agency alleged that, in the ordinary activity of plowing his dryland property, Duarte had committed numerous statutory violations.

ii. **Reform Proposals**

These incidents highlight the necessity of government-wide reform to ensure that individuals are afforded the basic due process guarantees of the Constitution whenever agency pre-adjudicatory or investigative procedures threaten their liberty or property. In addition to our clients’ experiences, the academic literature and published decisions show that many other regulatory schemes raise similar issues. The administrative “due process deficit” should be addressed via comprehensive reform. However, PLF’s experience—at the very least—supports two specific proposals to

⁷ Note: Mr. Duarte’s treatment raises many concerns related to due process in regulatory enforcement and adjudication, and his story will be featured several more times in this document. *See infra* sections II.B; IV.A & IV.B.

improve due process guarantees in the pre-adjudicative and investigative phase of agency enforcement.

1. Before any compliance order can issue, the individual subject to the action must be given fair notice and a hearing

Compliance orders threaten catastrophic financial penalties and often require landowners to pursue immediate costly mitigation measures. Yet, as illustrated by the experiences of the Boyds, Sacketts, and Johnsons, regulations authorizing such orders do not currently entitle landowners and other regulated parties to any notice of an investigation, notice of impending issuance of a compliance order, or any opportunity to contest the basis for such orders prior to issuance. This is a serious due process shortfall in at least EPA's pre-adjudication practice.

To remedy this deficiency, PLF recently submitted a petition for rulemaking on behalf of Michael and Chantell Sackett. *See* Petition for Rulemaking to Establish Notice-and-Hearing Procedures for Compliance Orders Issued Under Section 309(a) of the Clean Water Act (Jan. 10, 2020). This petition proposes that EPA establish notice-and-hearing procedures before a compliance order may issue under Section 309(a) of the Clean Water Act, to ensure that landowners are given an opportunity to present their side, offer evidence, and demonstrate that a compliance order is not warranted. *Id.*

2. Parties should be given notice and the right to institute a “show-cause” proceeding when they are under investigation for a regulatory infraction

The lack of notice in Clean Water Act enforcement suggests a need for reform across the federal government. PLF client stories highlight the immense cost of pre-adjudication and investigatory procedures on the individuals targeted. Law-abiding citizens were subject to federal agents entering their property and threatening them with crushing enforcement actions if they continued to use their property in the ordinary manner they desired. These untenable circumstances dragged on for years, only for the agency to back down once it was subjected to serious scrutiny⁸ or

⁸ For example, EPA finally backed down in its aggressive targeting of the Johnson family after an article highlighting the family's poor treatment was published in *The New York Times*. *See* Jack Healy, *Family Pond Boils at Center of a 'Regulatory War' in Wyoming*,

unanimous Supreme Court rebuke. Furthermore, in many cases, subsequent alleged violations could have been avoided if the agencies had immediately shared their concerns with the regulated individuals.

To avoid this unacceptable treatment of law-abiding citizens, all agencies with investigatory functions should issue judicially-enforceable regulations ensuring that individuals have notice of, and possess the right to, a “show-cause” proceeding if they are being investigated for a regulatory infraction. These show-cause rules should require the agency to bear the burden of proving the merit of continued investigation or other pre-adjudicative action and be conducted before an independent official or entity. Further, this initial hearing should, absent an obvious or demonstrable emergency, be a prerequisite to any agency issuance of a pre-enforcement order which could inhibit a property or liberty interest (such as the compliance and cease and desist orders issued to PLF clients in the Clean Water Act context). Finally, if the show-cause hearing concludes that the investigation is not warranted, that decision should protect parties for actions taken in reliance upon that conclusion.

The lengthy, expensive and sometimes harrowing interactions between PLF’s law-abiding clients and their government could have been avoided if the agencies had been required to provide notice of, and show cause for, their investigations. For example, in *Johnson v. EPA*, the investigation and compliance order were predicated largely on a single investigator’s incorrect reliance on Google Maps. The Johnson family’s travails could have been avoided altogether if there had been a show-cause procedure, allowing the early discovery of the investigator’s obvious mistake. Another example is the Boyds, whose activities were being informally investigated by the EPA, despite assurances from the agencies that all proposed activities were lawful. If the agencies had been required to inform the Boyds of their investigation and shown cause for their concerns, the Boyds would not have continued with their drainage project. Similarly, if EPA and the Corps had not delayed notifying Mr. Duarte of an investigation, he would have ceased his activities. Instead, EPA and the Corps conducted their investigations in such a manner as to allow the accrual of extreme penalties.

Finally, to ensure these show-cause hearings do not become a sham in any agency or impose further hurdles without any meaningful benefits, a show-cause

N.Y. Times, Sept. 18, 2015, <https://www.nytimes.com/2015/09/19/us/regulatory-war-fought-over-a-wyoming-familys-pond.html>.

determination favoring the agency should be appealable to a court of law. That would build a body of extremely valuable jurisprudence that would provide clarity and inject meaningful due process limitations on the form and basis for federal agency action.

B. QUERY 8: Do agencies provide enough transparency regarding penalties and fines? Are penalties generally fair and proportionate to the infractions for which they are assessed? What reform(s) would ensure consistency and transparency regarding regulatory penalties for a particular agency or the federal government as a whole?

PLF client experiences highlight the significant disproportionality of agency penalties to the alleged conduct, as well as a lack of enforcement perspective and transparency in penalty imposition. Many federal regulatory schemes permit low-level agency personnel to threaten the maximum civil, and even criminal, penalties on individuals who, and small businesses that, have acted in good faith and with ordinary conduct that most people would not suspect were unlawful—and in many cases are not unlawful.

Even when the alleged conduct is potentially illegal, crippling fines and prison sentences should not be threatened by front-line employees for trivial harms. Agencies cannot enforce laws in so open-ended a manner, such that any citizen could be threatened with ruinous civil penalties or face criminal prosecution for common, and often beneficial, conduct. There is a need for greater penalty transparency, broader law-enforcement perspectives, and fundamental fairness in agency threats and enforcement tactics.

i. Examples of Due Process Shortfalls: Disproportionate Penalties and the Clean Water Act

The implementation of the Clean Water Act has been notoriously opaque and punitive. EPA and the Corps have interpreted the Act in such a manner that seemingly innocent activities, like a farmer plowing a dry field miles from the nearest regulated waterway, could result in the imposition of ruinous civil and criminal penalties, or even imprisonment.

First, the experience of former PLF client Andy Johnson is again pertinent. As a result of his taking the good faith and environmentally beneficial action of building a statutorily-exempt stock pond, EPA threatened Mr. Johnson with fines of \$37,500 per

day if he did not comply with their demands. These threatened fines ultimately reached a total of nearly \$20,000,000.

Second, former PLF client John Duarte's case is likewise again relevant. After he challenged due process violations committed by the Corps in issuing a cease and desist order, the Corps retaliated by suing him for millions of dollars in penalties. The agency alleged that, in plowing his dryland property, Duarte had committed numerous Clean Water Act offenses, triggering penalty liability of up to \$40,000,000. After years of litigation, he reached a settlement with the federal government and agreed to pay a fine of \$330,000 and mitigation fees of \$770,000 because the risk of losing his business was too great if he continued the fight (although it now looks like he was right all along under an application of this administration's recent Navigable Water Rule).

A third example of the disproportionate penalties imposed on law-abiding citizens through the enforcement of the Clean Water Act is the experience of former PLF client Joe Robertson. This example has not been discussed above. Mr. Robertson, a veteran of the United States Navy, lived with his wife Carrie in the Montana woods, an area prone to destructive fires. To protect their home from wildfire, Mr. Robertson added several small ponds to an existing foot-wide rivulet which had the flow of two garden hoses.

Mr. Robertson thought little of this seemingly ordinary action taken to protect his home and family until the EPA showed up and declared that the nameless rivulet was a federally protected "navigable water" under the Clean Water Act, even though the nearest actually navigable river is 40 miles away. The government criminally prosecuted the 77-year-old man, and in 2016, he was found guilty, imprisoned for 18 months, and ordered to pay \$130,000 in restitution. Joe Robertson passed away in March 2019, having spent half of his last three years in prison for digging a handful of tiny ponds. His conviction for that conduct was vacated upon his death.

ii. Examples of Due Process Shortfalls: Disproportionate Penalties and the Endangered Species Act

The disproportionality of penalties for regulatory infractions is also highlighted by the enforcement of the Endangered Species Act's broad take prohibition. Section 11 of the Act imposes civil penalties of up to \$25,000 and criminal penalties of up to \$50,000, or a year in prison, for "knowing" violations of the law's "take" prohibitions.

16 U.S.C. § 1540(a)–(b).⁹ “Take” is defined in an extremely capacious manner, and includes generalized “harm” to a species. *See* 16 U.S.C. § 1532(19). The regulatory interpretation of the term “harm” broadly includes “habitat modification or degradation” which *could* “impair[] essential behavioral patterns . . .” 50 C.F.R § 17.3. This broad interpretation of “harm” has been upheld as “reasonable.” *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). Because penalties apply equally to “incidental take” or inadvertent violations of the Act, this broad regulatory interpretation has resulted in otherwise law-abiding citizens being targeted for hefty fines and even criminal prosecution for innocent mistakes.

Threatened penalties should not be the same for intentional and otherwise innocent activities. Consider the case of Tuang Ming-Lin,¹⁰ an immigrant from Taiwan, who in 1994 was accused of committing a take, after inadvertently filling in several tiny kangaroo rat holes while plowing a field on his California farm property. Twenty armed agents entered his property, and Mr. Ming-Lin was threatened with a \$300,000 fine and a claim for half of his farm. After being prosecuted for over a year, Mr. Ming-Lin agreed to settle the case in exchange for the payment of \$5,000 to a local conservation fund.¹¹

Or consider the case of Jim Neiger,¹² a wildlife photographer, who, after getting too close to a nest of snail kites in order to photograph them, was prosecuted for violating the ESA, facing \$100,000 in fines and up to a year in prison. After pleading

⁹ Note: These penalties are subject to the Federal Civil Penalties Inflation Adjustment Act and, therefore, the agencies can increase them annually at the rate of inflation, as such current penalties are actually higher than those cited here. *See* 2019 Inflation Adjustments for Civil Monetary Penalties, 84 Fed. Reg. 15,525 (Apr. 16, 2019).

¹⁰ Mr. Ming-Lin was not represented by Pacific Legal Foundation.

¹¹ *See Administrative Crimes and Quasi-Crimes: Hearing Before the Subcomm. on Commercial and Admin. L. of the H. Comm. on the Judiciary*, 105th Cong. 135–36 (1998) (Testimony of Roger J. Marzulla), http://commdocs.house.gov/committees/judiciary/hju59925.000/hju59925_of.htm.

¹² Mr. Neiger was not represented by Pacific Legal Foundation.

guilty, he also agreed to pay a \$9,000 fine in order to avoid the seizure of his boat and camera.¹³

iii. Reform Proposals

Reform is necessary to ensure basic principles of due process are respected when agencies threaten or impose civil penalties or pursue criminal prosecutions for regulatory violations. Every federal agency with enforcement authority should take the necessary steps to ensure that threatened penalties are fair and proportionate to the infractions for which they are assessed and are imposed in a transparent manner.

PLF's experience highlights the necessity of five reforms: one specific to the Clean Water Act, one specific to the Endangered Species Act, and three which are broadly applicable across the federal government.

1. Criminal and civil Clean Water Act penalties should only be sought when the action would otherwise constitute a common law nuisance

As highlighted by the examples of Mr. Duarte, Mr. Johnson, and Mr. Robertson, the prohibitions of the Clean Water Act have been interpreted so broadly that harmless, ordinary, and innocent activities that harm no one concretely, and at worst, can be easily corrected, can result in the imposition of tremendous penalties and even imprisonment. This is incompatible with a system that values due process, fairness, and the rule of law. To respect due process, EPA should, at a minimum, issue regulations requiring that, for large civil or criminal penalties to be sought for a Clean Water Act violation, the offending conduct must constitute a common law (public or private) nuisance. If the nuisance standard is not met then enforcement should be strictly limited to appropriately minor administrative penalties (perhaps under \$5,000) or remedial orders. An ordinary activity, which causes no concrete harm to a neighboring property, community, or the public health, should not be the trigger for a multimillion-dollar enforcement action or criminal prosecution.

¹³ Bob Kealing, *Wildlife Photographer Pleads Guilty to Violating Endangered Species Act*, WESH2, Feb. 26, 2014, <https://www.wesh.com/article/wildlife-photographer-pleads-guilty-to-violating-endangered-species-act/4431860>.

2. The Fish and Wildlife Service should revisit the regulatory interpretation of “harm” and adopt a narrow construction of the ESA for incidental take

To respect due process in Endangered Species Act enforcement, the Fish and Wildlife Service should amend its regulation interpreting the term “harm” so that inadvertent violations will not be targeted for criminal prosecution.¹⁴

As discussed above, the broad regulatory understanding of take through “harm” to a species has the potential to impose enormous penalties on innocent conduct. This is primarily due to the inclusion of habitat modification as a category of harm. Inadvertent alteration of species’ habitat should not render one liable for ruinous civil penalties or criminal prosecution. The Fish and Wildlife Service should therefore amend its regulatory interpretation of “harm” to include only activities actually directed at harming a species, not mere modifications of habitat.

The Fish and Wildlife Service has recently proposed a similar reform with respect to the Migratory Bird Treaty Act. *See* 85 Fed. Reg. 5915 (Feb. 3, 2020). The Migratory Bird Treaty Act contains broad prohibitions on the take of a species similar to those found in the Endangered Species Act. *Compare* 16 U.S.C. § 703(a) *with id.* § 1532(19). Under the proposed regulations, the Fish and Wildlife Service interprets the Migratory Bird Treaty Act’s prohibition narrowly, such that criminal prosecutions will be limited to those deliberate actions that are actually “directed at migratory birds, their nests, or their eggs.” 85 Fed. Reg. at 5926. Like regulations should be promulgated by the Fish and Wildlife Service under the Endangered Species Act. Individuals should not be criminally prosecuted or fined enormous sums of money when they have formed no intent to take a species or did so inadvertently.

¹⁴ Note: In making this suggestion, PLF does not take a position on the legal question of the Service’s power to interpret the statute in this manner. Instead, we are making a practical, policy-based suggestion as to how to fix the due process problem raised by the Act’s current application to innocent conduct.

3. Agencies should take formal steps to ensure criminal prohibitions and harsh civil penalties cannot be interpreted to reach unknowing, ordinary, innocent, or inadvertent conduct

PLF client stories and previous two agency-specific proposals support a broader proposal: every agency should ensure that criminal prohibitions and civil penalty provisions are not employed to punish ordinary and normal conduct of otherwise law-abiding citizens. Thus, agencies should declare by regulation that, for a criminal prosecution to occur or for a civil penalty greater than \$5,000 to be threatened or imposed, the offending conduct must have been deliberate and actually directed at a specified prohibited outcome. Otherwise, enforcement should be limited to minor administrative penalties of less than \$5,000 and/or reasonable remedial remedies.

4. Agencies should adopt and publish binding tables of administrative penalties for common, minor infractions

To ensure greater transparency in penalty enforcement and eliminate an incentive for low-level officials to pile on charges to coerce settlements, all agencies with the authority to issue fines should publish tables identifying classes of common de minimis violations. These tables should identify the maximum administrative penalty that will be sought and under what circumstances it will be sought. This proposal is essential to ensure that potential agency targets are provided adequate notice of the penalties to which they may be subject and that arbitrary penalties aren't threatened or collected.

Further, when a violation is minor and thus ineligible for criminal prosecution or harsh civil penalties, the tables should limit the imposition of daily accrued penalties for the duration of a violation. Such penalties for minor infractions should not accrue daily, especially when the citizen is contesting the validity of the agency determination and there is no concrete, additional harm from his not bending immediately to the agency's will. This would prevent the "runaway penalty" scenario experienced by PLF clients, such as the Sacketts and Andy Johnson, when the major harm after the initial (and it turns out legal) conduct seemed to be that the agency's authority was questioned.

5. Senior officials should play a more active role in determining whether penalties should be sought

Finally, PLF proposes that, in all cases, senior agency officials take a more active role in the imposition of serious penalties to ensure appropriate oversight. The experience of Mr. Duarte and Mr. Johnson underscores the peril of a system in which low-level field agents have primary responsibility for determining whether crippling penalties should be sought or imposed. These field agents often lack perspective, they are not politically accountable to the public,¹⁵ and they often have a perverse incentive to seek the absolute maximum, regardless of the gravity of the offense to coerce settlements. These incentives and harms exist even when there is the possibility of later review by more senior agency officials. Once an agency's threat is conveyed, agency orders are issued, or other proceedings are commenced, the agency's position calcifies, factual assumptions aren't seriously re-examined or questioned again (even if they should be), and supervisors will be urged not to "back down." A different result is likely if politically accountable officials with broader law enforcement perspectives weigh the evidence and make the initial decision, especially if their decisions are subject to judicial review. *See infra*.

C. QUERY 9: When do regulatory investigations and/or adjudications coerce Americans into resolutions/settlements? What safeguards would systemically prevent unfair and/or coercive resolutions?

The disproportionality and opaqueness of agency penalty practices identified above give agencies immense leverage in any settlement discussions. As these PLF client stories illustrate, that agencies are empowered to threaten such penalties is often enough for innocent parties to agree to pay large settlements. When faced with the choice of either settling for a lesser sum, or pursuing years of expensive litigation, parties often choose settlement.

John Duarte's story serves as a good example of this coercion. After years of litigation, Mr. Duarte reached a settlement with the federal government and agreed to pay fines and mitigation of approximately one million dollars. Mr. Duarte admitted no liability, and although he would have preferred to continue fighting in litigation, he could not afford taking the risk of a loss and its disastrous financial impact to his

¹⁵ For further discussion of the constitutional and structural due process implications of this lack of accountability, please see our discussion of query 10 at *infra* section IV.C.

family, his business, and his hundreds of employees. An application of more recent rules by this administration suggests he would have won his argument, but Mr. Duarte couldn't take that chance two years ago.

EPA's use of compliance orders discussed previously also highlights this issue. Obeisance to such compliance orders is the normal course for landowners, due to the ruinous civil penalties that attend any violation. *See Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). For example, when Mike and Chantell Sackett were issued a written compliance order, they were threatened with tens of thousands of dollars per day in civil fines. Although landowners can now seek judicial review of these compliance orders *after* they have been issued (partly due to the Sacketts' Supreme Court victory), many landowners, when faced with the choice of complying, pursuing expensive litigation, or incurring potentially millions of dollars in penalties, have no choice but to comply.

This issue again highlights the dire need for reform to ensure that penalties are transparently imposed and proportionate to the violation. As such, we reiterate each proposal from query 8. If the power to levy disproportionate penalties on innocent parties were cabined, then agencies would have less unfair and disproportionate leverage in settlement discussions, and thus, less power to unreasonably bully individuals like John Duarte into coerced settlement or compliance.

III.

ADJUDICATIVE PROCESS REFORMS (QUERIES 4, 5, 6, AND 11)

Queries 4, 5, 6, and 11 raise a number of issues pertaining to the reform of administrative adjudicative processes.

- A. **QUERY 4: In the regulatory/civil context, when does an American have to prove an absence of legal liability? Put differently, need an American prove innocence in regulatory proceeding(s)? What reform(s) would ensure an American never has to prove the absence of liability? To the extent permissible, should the Administration address burdens of persuasion and/or production in regulatory proceedings? Or should the scope of this reform focus strictly on an initial presumption of innocence?**

Oftentimes, agency practice results in evidentiary burdens being placed on individuals to prove why they should *not* have their property or liberty interests

harmed by agency action. This occurs even where statutory guidelines require agencies meet certain burdens in their analysis. This is a deprivation of the fundamental right to due process as codified by the Fifth Amendment to the United States Constitution. Administrative agencies should retain the burden of proof in any regulatory proceeding and regulatory, statutory, or constitutional reform is necessary to ensure that these fundamental rights continue to be honored within our system of government.

i. Examples of Due Process Shortfalls

The ways in which these fundamental due process guarantees have been evaded by agencies is apparent from the experiences of PLF clients who have seen their businesses and livelihoods affected by arbitrary and unlawful critical habitat designations under the Endangered Species Act. Often, the Fish and Wildlife Service will make such designations without following the statutory requirements that they meet their burden of properly considering economic impacts, either under the ESA itself or other regulatory reform statutes. In each such case, the burden has been placed on the individual to prove why an agency should be required to follow the rules and appropriately consider economic impacts in making a critical habitat designation. Although the Endangered Species Act violations are common, the problem is not limited to any one statute or agency. The issue of agencies failing to meet statutorily imposed burdens, but then imposing the burden on affected individuals to hold them accountable, is widespread and necessitates broader reform. The following PLF client experiences highlight this issue.

1. *California Cattlemen’s Association v. U.S. Fish and Wildlife Service*

In 2016, the U.S. Fish and Wildlife Service designated over 1.8 million acres in 16 California counties as critical habitat for three frog and toad species. *See* 81 Fed. Reg. 59,046 (Aug. 26, 2016) (Final Rule) (AR 000007–81). This rule had a devastating impact on many small businesses and ranchers operating within the range of the species. Many members of PLF client California Cattlemen’s Association experienced a dramatic threat to their livelihoods as a result of this unlawful designation.

The Association sued on the grounds that the Service attempted to evade the Regulatory Flexibility Act’s requirement to determine the economic impact of the new rule on “small entities” by claiming that no small entities were impacted. Instead of establishing the extent of impact contemplated by the new rule through appropriate analysis, the Service merely assumed that, due to the requirements of Section 7 of the Endangered Species Act, there would be no significant economic impact on small

entities. Section 7 requires federal agencies to consult with the Service to determine whether activities involving federal action will harm a protected species. *See* 16 U.S.C. § 1536. By considering these other agencies to be the entities “directly regulated” under the Regulatory Flexibility Act, the Service presumed that any private entity affected by the new rule would be only “indirectly regulated” and therefore outside the requirements of the Act.

The California Cattlemen’s Association had to file suit in an attempt to force the Service to meet its burden of proving the nature and extent of the new rule’s impact on small entities. Despite the case being ultimately dismissed on procedural grounds, the United States District Court held that PLF’s clients were indeed directly regulated by the rule for purposes of the Regulatory Flexibility Act.

2. *Northern New Mexico Stockman’s Association v. U.S. Fish and Wildlife Service*

In 2016, the U.S. Fish and Wildlife Service designated as critical habitat some 14,000 acres of land and 170 miles of streams in Arizona, Colorado, and New Mexico for the New Mexico meadow jumping mouse. The designation severely limited ranchers’ access to grazing land and watering spots and, according to the Fish and Wildlife Service, added \$20,000,000 in regulatory costs, threatening the livelihoods of many ranchers in the area. This regulation hit members of the Northern New Mexico Stockman’s Association, PLF’s client, particularly hard. Many members of the Association are members of the Hispanic Ranching Families of New Mexico, whose histories date back 400 years to the North American livestock industry’s origins and who depend on the land for their livelihoods. These ranchers own water rights for livestock grazing, but the critical habitat designation threatened access to that water—even in places where the mouse couldn’t be found. In Otero County, the U.S. Forest Service even put up electric fences to prevent access to streams and creeks and stated that ranchers may have to reduce future herd sizes to accommodate the designation.

Because the Fish and Wildlife Service did not conduct a full economic analysis prior to the critical habitat designation as required by law, PLF filed a lawsuit on behalf of the Northern New Mexico Stockman’s Association and the Otero County Cattlemen’s Association.

The Endangered Species Act requires the Service to calculate and weigh the economic costs of a critical habitat designation and consider limitations on that designation in the event that such a designation would impose substantial economic

costs. *See* 16 U.S.C. § 1533(b)(2). However, the Service sidestepped this requirement by assuming that any costs associated with the listing of the species as endangered or protected were already accounted for by the listing of the species and, therefore, should be discounted from its economic analysis. This so called “baseline” approach resulted in millions of dollars of economic impact being ignored. Since the Act places the requirement to analyze economic impact on the designation of critical habitat rather than the listing of the species (these are supposed to happen together), the Service effectively dodged the requirement to analyze many economic costs by bureaucratic subterfuge. It is then incumbent on litigants such as PLF’s clients, the Northern New Mexico Stockman’s Association and the Otero County Cattlemen’s Association, to file suit against the Service to enforce the requirement that the economic impacts imposed on them are properly calculated and considered before agency action is taken. Parties harmed by regulation should not bear the burden of proof of ensuring that agencies follow the rules set for them by Congress.

ii. Reform Proposals

Regulatory reform is necessary to ensure that proof burdens in the administrative context comport with basic due process requirements. PLF’s proposals for reform are broader than a strict focus on an initial presumption of innocence, and the Administration should broadly address burdens of persuasion and production in regulatory proceedings. Agencies should hold themselves accountable for the rules they are instructed by statute to follow, without imposing that burden on individuals. Better follow-through by regulatory agencies on their responsibility to undertake careful analyses and meet their burdens of proof in proceedings would lead to better, more accurate rulemaking and avoid needlessly imposing costs on persons’ liberty and property interests. We propose the following reforms.

1. Agencies should adopt an audit process to ensure that proof burdens are met rather than assumed

Federal agencies should be required to conduct meaningful regulatory analyses where Congress has required them to do so. Such agencies must not be permitted to evade this responsibility without proof that a statutory exception or condition is satisfied by competent evidence. One way this could be achieved is through the commencing of audits by agencies that are required to conduct economic analyses, such as the U.S. Fish and Wildlife Service. These audits would look for instances in which the burden is on the government to establish whether and to what extent an agency action would impact individuals and businesses. If the agency relies on

guidance, procedures, or internal documents that allow it to shift this burden of proof to a regulatory presumption of zero impact, these should be discarded in favor of a meaningful analytical tool.

If the Service had internal policies to ensure it adequately met its burden of conducting the legislatively prescribed Regulatory Flexibility Act analysis in *California Cattlemen's Association*, it would have informed the proposed rule's development by establishing the manner and extent of economic hardship such a rule would impose on small entities. Likewise, PLF's small entity clients would not have been required to navigate a complex and costly litigation process in order to vindicate their interests—a system that imposes both private and public costs. Reversal of the burden of proof tends to fall disproportionately on smaller, private firms and individuals. Requiring federal agencies to discharge this burden would eliminate unnecessary public and private costs. Similarly, requiring the Service to measure the costs of its actions rather than assume them away would go a long way in avoiding needless litigation costs or the imposition of economic costs by the tailoring of critical habitat designations to avoid them, as Congress intended.

B. QUERY 5: What evidentiary rules apply in regulatory proceedings to guard against hearsay and/or weigh reliability and relevance? Would the application of some of the Federal Rules of Evidence create a fairer evidentiary framework, and if so, which Rules?

Adherence to evidence rules in federal courts ensures that hearings are administered fairly and that finders of fact are relying on the most accurate and probative evidence available in rendering a just decision. This framework is equally important for administrative agencies as it is for courts of law since the everyday impact on the liberty and property interests of Americans occurs with greater frequency and severity as the administrative state continues to grow. Unfortunately, basic rules of evidentiary competence are not required in administrative enforcement and adjudication, resulting in a significant due process shortfall.

i. Examples of Due Process Shortfalls

In *Foster v. Vilsack*, the Natural Resources Conservation Service, a branch of the U.S. Department of Agriculture, determined that there existed Clean Water Act jurisdictional wetlands on the farmland property of PLF clients Arlen and Cindy Foster, thus requiring the expense of attaining a section 404 dredge-and-fill permit to perform certain activities on the property. In proving this contention, USDA staff were

permitted to investigate a separate parcel of land some 33 miles away. This parcel was related to the alleged wetland only in that it supposedly had similar weather conditions for agricultural purposes. Instead of having to prove by reliable evidence that the Fosters' property in South Dakota would support wetland vegetation, by inspecting that property itself, the Department was permitted to prove this conclusion by inspecting a proxy location (or "comparison site") they already knew would support wetland vegetation. Doing so obviously led to an affirmative answer, allowing the Service to effectively evade any meaningful analysis specific to the land in question. The Service preselected the comparison site 16 years earlier, knowing that it would support wetland vegetation. They have subsequently used the proxy site whenever they investigate a possible wetland with similar soils and disturbed vegetation anywhere in the surrounding 10,835 square miles.

ii. Reform Proposals

The *Foster* case again highlights a "due process deficit" in the regulatory enforcement and adjudication context. This deficit is highlighted by non-credible evidence being relied upon to impose significant regulatory consequences. The following reforms are necessary to ensure that due process is respected whenever an agency presents evidence in the regulatory enforcement or adjudication context.

1. Regulated persons should be permitted to challenge the credibility and sufficiency of evidence in administrative proceedings

In courts of law, evidence must be sufficiently reliable and relevant, particularly where scientific material is involved. Rules to ensure such reliability should also apply in regulatory enforcement and adjudication proceedings. For instance, instead of being able to assume that an area with similar weather patterns is identical to the land at issue, as the USDA was permitted in the *Foster* case, an agency should be required to prove such conclusions to a reasonable degree of scientific certainty. To ensure this, a person subject to the administration of this process should have the opportunity to challenge the scientific methods used in making such a determination.

Having a process through which to challenge evidence more generally will lead to agency conclusions being fact bound and reliable. This will provide a more stable and credible basis for agency decision making and will clarify the issues for appeals boards and later adjudicative proceedings. Further, it gives persons the ability to understand and challenge the veracity of the evidence against them. The adversarial

process, therefore, would provide a testing ground for evidence rather than regulatory assumptions or bureaucratic chicanery.

2. Agencies should adopt the *Daubert* standard used in federal courts for determining the veracity of scientific evidence

Too many agency functions require a foundational understanding of scientific evidence and methods for agencies to rely on lay-bureaucratic assumptions of similarity or reliability. Instead, agencies should adopt the federal courts' *Daubert* standard for determining the veracity of scientific evidence. *Daubert* held that in determining the soundness of a scientific methodology, the following factors should be considered: (1) whether the theory or technique can or has been tested, (2) whether and the extent to which it has been subject to peer review or publication, (3) its error rate, whether known or potential, and (4) whether it is widely accepted in the relevant scientific community. *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).

In the Clean Water Act context, adherence to the best evidence available would lead to more accurate determinations of whether land is jurisdictional and provide landowners a meaningful process for having their property evaluated. In the *Foster* case, this would likely have resulted in the proper finding that the property was not a wetland requiring a section 404 dredge-and-fill permit. Greater accuracy in this regard would reduce the uncertainty and costs faced by ordinary Americans.

C. QUERY 6: Should agencies be required to produce all evidence favorable to the respondent? What rules and/or procedures would ensure the expedient production of all exculpatory evidence?

Often in the context of administrative investigations and adjudications, agencies discover information that tends to support the regulated party. Information deemed harmful to the regulated party might also be inaccurate or irrelevant, though the agency continues to rely on it. If hearings, enforcement proceedings, and investigations based on collected evidence are to be conducted fairly, the agencies should be required to disclose both facts with a tendency to establish a case *against* the individual and those that tend to vindicate him. This is particularly important in the context of administrative proceedings because the rules of discovery available to litigants in courts of law do not generally apply. The right of an individual to be informed of the cause and nature of allegations against him is a fundamental right defended by the Sixth Amendment to the United States Constitution.

Texas has established an “open file policy” in its criminal investigations, without any harm to its interests or significant costs.¹⁶ An open-file policy for regulatory agencies is even more important where there is not a neutral, judicial official supervising the proceedings. Except for exceptional circumstances that could be defined in regulations, regulatory agencies should not be afraid to share their evidence and information with the regulated party, and due process will often require that. The broader the rule of evidence sharing, the easier and cheaper it will be to administer.

i. Examples of Due Process Shortfalls

Once more, the experience of John Duarte is instructive. In addition to the penalty and coercion issues discussed above in Part II, Mr. Duarte’s case highlights the due process peril in EPA and the Corps’ practice of shielding investigative reports and other relevant evidence from enforcement targets. Following the commencement of litigation in Mr. Duarte’s case, it became apparent that the Corps employee, who had investigated the alleged unpermitted filling of wetlands, had ignored evidence favorable to Mr. Duarte in favor of seriously mistaken evidence that supported a finding of illegality. This resulted in reliance on false and misleading information.

By limiting his investigation to sources that would reinforce his view of the situation, the agency employee produced a demonstrably false investigative report with three key errors in it: that the property had been plowed to a depth of three feet (a figure that the government’s expert witnesses later concluded was an average of seven inches), that the plowing had permanently destroyed more than twenty acres of wetlands (a claim that evidence later showed to be false), and that this had been done with Mr. Duarte’s and his company’s full knowledge and consent (evidence established the contrary, that Mr. Duarte had instructed that in plowing the property, the wetlands be avoided; he only learned after the fact that these instructions had been ignored).

The investigator did not share this investigative report with Duarte before submitting it to decision makers and commencing the enforcement process. If this evidence had been disclosed at an earlier stage in the proceeding, Duarte Nursery

¹⁶ Andrew Cohen, Brennan Ctr., In Texas a Bold Step Toward Justice (2013), <https://www.brennancenter.org/our-work/research-reports/texas-bold-step-toward-justice>.

would have been able to dispel all three of the false claims highlighted above from the report, with credible evidence, and the entire situation might have been avoided.¹⁷

ii. Reform Proposals

Reform is necessary to ensure that agency nondisclosure does not continue to violate the due process rights of enforcement targets. PLF would propose the following reforms.

1. Agencies should give people early and substantial access to the evidence which will be used against them

Early and substantial access to evidence would streamline investigations, enforcements, determinations, and other agency proceedings while ensuring due process safeguards. Particularly where investigations and enforcement proceedings can generate criminal as well as large civil penalties, the reliance on accurate, tested, and complete information is critical. Therefore, federal agencies should issue a judicially enforceable rule of disclosure before proceeding with enforcement proceedings or administrative hearings against people. A rule of this nature could require the government to furnish a summary of the evidence in its possession on which it plans to rely in the forthcoming adjudication or determination and would provide a prescribed period of time for the recipients of this information to correct any of these allegations, provide additional information to the federal agency, or prepare a defense or motion for a show cause against them.

A disclosure requirement for the government to present sufficient evidence against a person, similar to a probable cause hearing early in a criminal proceeding, would provide an opportunity for a pre-enforcement or pre-hearing process in which inaccuracies, falsehoods, and gaps in government findings can be explained. This would avoid costly proceedings entailing public and private costs. Further, it would complement the reform proposed in response to query 1 for the requirement of a show-cause hearing through which enforcement targets could challenge the sufficiency of evidence or basis for a federal agency's action. *See supra* section II.A.

¹⁷ This story also provides further support for the query 1 proposal that parties should be given notice and the right to institute a “show-cause” proceeding when they are under investigation for a regulatory infraction. *See supra* section II.A.

Further, not only would enforcement of a disclosure rule ensure greater due process protections, it could reduce regulatory waste and remove nonmeritorious actions by agencies from their task lists. In a case such as *Duarte*, the falsity of certain reports and findings could have been exposed early on, preventing further expenditure of public resources. Knowing the (inaccurate and false) information on which the government relied would have provided Mr. Duarte the ability to more quickly furnish the appropriate evidence necessary for a complete and accurate investigation, which could have resulted in proceedings being discontinued rather than pursued. Discovering that agency investigations are misguided early in the process has the potential to cease proceedings that cost taxpayer and private funds before they continue at great expense.

D. QUERY 11: Are there certain types of proceedings that, due to exigency or other causes, warrant fewer procedural protections than others?¹⁸

Unnecessary procedural steps, even those that are well meaning, result in unduly lengthy and burdensome procedures for regulated entities. Due process problems frequently arise where administrative agencies require permit applicants or subjects of investigation and enforcement proceedings to bear substantial costs in both time and money before obtaining a final decision or judicial review. Through bureaucratic complexities, or unreasonable delay, some agencies string out administrative adjudicative proceedings for long stretches and impose such high costs on continuing through the process that even individuals with meritorious claims are dissuaded from continuing an application, challenging an agency action, or seeking review in an Article III court.

i. Examples of Due Process Shortfalls

The byzantine, years-long Clean Water Act enforcement process often forces property owners to capitulate to the investigators and give up on reasonable,

¹⁸ Note: In our response to query 11, we addressed the related (but nevertheless slightly different) issue of excessive procedural steps burdening and creating due process shortfalls for those seeking an agency permit or judicial review of an agency enforcement decision. While we do not have precise suggestions for eliminating procedural protections for the sake of exigency (as suggested by the query), our Clean Water Act experience raises a number of issues regarding a similar concern with unnecessary agency procedural steps.

constitutional land use—because of the overall costs, temporal length, business pressures, and emotional toll of a government investigation or civil prosecution. Instances abound where the number of procedural steps of even well-meaning protections actually harmed an enforcement target, i.e., they couldn't afford to keep fighting the agency. In addition to the Clean Water Act context, the problem is also pertinent to the issue of coerced settlements discussed in response to query 9 above. *See supra* section II.C. The examples listed below involve property owners who refused to acquiesce, but they represent untold numbers of landowners who were forced to give in.

This problem warrants correction via broad deregulatory reform to ensure that procedural hurdles do not impose undue costs on individuals subject to regulatory enforcement and adjudication.

1. *Sackett v. EPA*

Michael and Chantell Sackett's saga is again pertinent. As discussed above, although the Sacketts' home posed no threat to water quality, federal EPA regulators declared their property to contain a wetland and demanded they stop all work and restore the lot to its natural condition or pay fines of up to \$75,000 per day. *See supra* section II.A.

The Sacketts didn't want to pursue years of agency process if they were right that EPA had no jurisdiction over their property. Yet, when the Sacketts sued to challenge the EPA order and its jurisdiction, EPA asserted the Sacketts had no right to judicial review. The district court and Ninth Circuit Court of Appeals agreed and tossed their lawsuit out of court. The United States Supreme Court unanimously reversed, ruling that failure to allow the lawsuit violated the Sacketts' constitutional due process rights. They are now litigating their claims in federal district court in Idaho—well over a decade since they first tried to build their home. The federal government continues to interfere with reasonable plans for their property in a residential subdivision and has been aided in doing so by the presence of excessive procedural steps, preventing fast and efficient judicial review—although its recent Navigable Water Rule may finally provide a path forward to settle the suit on terms favorable to the Sacketts.

2. *U.S. Army Corps of Engineers v. Hawkes Co.*¹⁹

In *U.S. Army Corps of Engineers v. Hawkes Co.*, the U.S. Army Corps of Engineers improperly claimed jurisdiction over former PLF client Kevin Pierce's property. This put Mr. Pierce, and his Hawkes Company, in the untenable position of (1) abandoning all use of the land at great loss; (2) spending several hundred thousand dollars to seek an unnecessary federal permit; or (3) using the land without federal approval at the risk of \$37,500-a-day fines and criminal prosecution. Hawkes challenged the Corps in court, but lower courts dismissed the case as unripe for review, pending more agency process and appeals.

Years later, the Supreme Court disagreed, holding that the Corps' claim of authority of his land was subject to challenge as a final decision with consequences for the landowner. Mr. Pierce was immediately proven right—and the federal government wrong—when, upon remand, the district court promptly threw the Corps' claim of jurisdiction out of court, holding there was no reason whatsoever to justify the Corps' assertion of jurisdiction because there were no navigable waters on his property. If excessive and unnecessary procedural steps had not prevented access to an Article III forum, Mr. Pierce's nightmare would have ended years earlier.

3. *Marquette County Road Commission v. EPA*

In *Marquette County Road Commission v. EPA*, a simple plan for a county road in the Upper Peninsula of Michigan went awry because of the EPA's unwarranted, arbitrary, and capricious refusal to approve a Michigan state Section 404 permit for the county. The Road Commission did not have the money to start the permitting process all over again with the Corps of Engineers, as the EPA required. As such, they had no choice but to challenge the denial, represented by PLF.

Marquette County, Michigan, is home to the nation's only nickel mine. Although the nearest nickel refinery is only 22 miles from the mine, the only truck route available between the mill and mine is some three times longer than necessary. Further, this road was shared with ordinary traffic and passed through the city of

¹⁹ Note: Like the Sacketts, the Pierces' treatment raises many concerns related to due process in regulatory enforcement and adjudication, and Mr. Pierce's experience will be featured another time in this document to highlight additional issues beyond those raised by query 11. *See infra* section IV.A.i.

Marquette. As a result, large trucks carrying nickel for refinement passed several times a day through the city streets. The Marquette County Road Commission proposed a new direct road that would shave 30 miles one-way—1.5 million miles per year—bypass the city altogether, and annually save 500,000 gallons of fuel.

Though the state approved the plan, the EPA vetoed it after years of back and forth over the permit with only vague objections; at one point, the Commission offered to protect thirty acres of wetlands for every one acre impacted by the road—to no avail. Ultimately, EPA vetoed the state-approved 404 permit, requiring the Road Commission to start over. This ended the plan for the road because the county could not in good conscience continue to spend taxpayer money for a road project that the federal government had made clear it would never approve. Such a long, arduous, and costly process raises significant due process concerns.

4. *ESG Companies v. U.S. Army Corps of Engineers*

In *ESG Companies v. Army Corps of Engineers*, ESG found itself held hostage by the EPA and Army Corps for virtually thirty years because of the byzantine, vague Clean Water Act rules, which were continually subject to change.²⁰ ESG's long struggle began when it proposed plans for a multiuse community in Virginia to address local housing demand. While clearing out land in 1989, the Corps asserted that the property contained jurisdictional wetlands and that a wetland delineation was required. Since ESG had developed other land with identical characteristics in the area in the past, ESG did not know what this decision would set in motion. Clearly, the rules had changed. ESG hired experts; the Corps dismissed their assessments.

The delineation took years to complete because Corps officials disagreed on the criteria for determining wetlands. The regulatory environment changed again in 1999, when Virginia adopted the Federal Section 404 regulations to create an expedited one-stop permitting system and required a permit to excavate the land. ESG hired more experts to complete another wetland delineation for the Virginia Department of Environmental Quality wetland permit. The state Department of Environmental Quality approved the permit in the early 2000s. Yet the state-approved plans were then rejected by the Corps for vague and unsubstantiated reasons. Five years after the state

²⁰ ESG Co. was not represented by Pacific Legal Foundation.

permit was issued, the Corps, purportedly utilizing the same regulations, again denied ESG's request.

Later, after more efforts to revise the plan to earn approval from the Corps, the Corps adopted a new regional supplement which expanded the definition of a wetland, and ESG was forced to start over with a new set of rules. By 2017, that 15-year state permit was set to expire and the Corps had yet to relent. ESG spent over \$4.5 million in this multi-decade odyssey with the Corps. Such an excessive and costly series of procedural steps is an affront to due process and highlights the necessity of broad regulatory reform.

ii. Reform Proposals

The above examples highlight that reform is necessary to ensure that additional procedural steps imposed by agencies don't impose unreasonable costs on regulated entities or effectively deny them judicial review. The following reforms would reduce unnecessary procedural steps, and others ensure a prompt right to appeal an agency action or decision to an Article III court.

1. Agencies should adopt a textualist approach to APA Section 704, requiring only final agency action to access an Article III court

Section 704 of the Administrative Procedure Act, as wrongly interpreted by the courts (at the federal government's behest), requires an individual to show: (1) agency action is the "consummation" of the agency's decision-making process rather than being merely tentative or interlocutory in nature; and (2) the agency action is one in which rights or obligations have been determined or from which legal consequences will flow. Agencies should concede the Administrative Procedure Act only requires final agency action in order for an individual to challenge agency action. Further, agencies should urge the courts to recede from *Bennett v. Spear's* second prong in favor of a textualist application of Section 704.

Thus, if regulated parties show that the agency's decision making has been consummated, the government should not oppose the private party's resort to the courts and, to the extent possible, concede the right to judicial review. If an agency believes it is fairly and reasonably regulating the alleged conduct or property, then it should have no objection to a neutral judge determining whether that is the case.

This reform would have eliminated unnecessary procedural steps and allowed each affected landowner mentioned above judicial review of the merits of the government's position. In the *Marquette County* case, such reforms would have allowed the county access to the courts. Instead, the agency thwarted this access to an Article III forum by expansive and extravagant arguments in favor of the current interpretation of Section 704, as it did in the *Sackett, Hawkes*, and *Marquette County* cases. Permitting swift judicial review would reduce the uncertainty and costs faced by Americans simply trying to pursue their livelihoods.

2. Agencies should permit individuals to avoid administrative appeals boards in favor of more direct access to Article III courts

Further, administrative agencies should adopt policies that allow individuals to elect *not* to appeal an agency's action to an administrative appeal board, but instead proceed directly to an Article III court. Moreover, for those who elect to appeal to an administrative board, agencies should set a cap on the time for rendering a final decision (30 or 60 days). This would help to short-circuit the deprivation of due process that travels with lengthy and costly delays in the process of administrative adjudication.

IV.

STRUCTURAL REFORMS (QUERIES 2, 3, 7, AND 10)

Queries 2, 3, 7, and 10 each pertain, in part, to needed agency structural reforms.

A. QUERY 2: When do multiple agencies investigate the same (or related) conduct and then force Americans to contest liability in different proceedings across multiple agencies? What reforms would encourage agencies to adjudicate related conduct in a single proceeding before a single adjudicator?

QUERY 3: Would applying the principle of res judicata in the regulatory context reduce duplicative proceedings? How would agencies effectively apply res judicata?

As previously discussed, agency enforcement actions are often unduly complex and confusing. *See supra* section III.A (discussing the due process concerns raised by the unduly burdensome nature of administrative proceedings with multiple, years-long procedural steps). As a result, these processes can overwhelm and wear down citizens, effectively pressuring them into unfair settlements. *See supra* section II.C (discussing, in

response to query 9, the due process concerns raised by burdensome agency enforcement actions and disproportionate penalties coercing Americans into unfair settlements).

These due process problems are compounded when multiple agencies investigate the same conduct or when agencies bring serial investigations and enforcement actions against the same person or business for essentially the same set of facts.

When this occurs, individuals must spend even more time, money, and effort to understand the proceedings and respond to them. For example, where multiple agencies are involved, it may be unclear which, if any, is the lead agency or which has the primary decision-making power and, therefore, who the enforcement target must persuade. Further, stipulations between the individual and one agency, or helpful findings by one agency's adjudications, might not be accepted by another agency, leading to unfair surprise, frustration, and wasted time.

i. Examples of Due Process Shortfalls: The Clean Water Act, EPA, and the Army Corps

The problem of multiple or successive investigations often involve agencies with overlapping authority. The Environmental Protection Agency and the Army Corps, for instance, both have permitting and enforcement authority over the Clean Water Act. The two agencies have concurrent authority to make the critical determination under the Clean Water Act regarding what geographical features fall under the Act's requirements as a "water of the United States." But EPA takes the position that it is not bound by the Army Corps' decisions. The PLF client stories in *Smith Farms*, *Sackett*, *Hawkes*, *Marquette County*, and *Duarte*, discussed above,²¹ highlight a series of closely related due process problems arising from the confusing relationship between EPA and the Army Corps.

First, this confusing relationship can result in regulated parties being shuttled from one agency to the other during an enforcement investigation, without knowing which agency they need to convince on an issue. This is precisely what happened to Mike and Chantell Sackett, when their empty lot—on which they had planned to build

²¹ See *supra* sections II.A.i.1 (*Smith Farms*); II.A.i.2 (*Sackett*); II.A.i.4 (*Duarte*); III.D.i.2 (*Hawkes*), & III.D.i.3 (*Marquette*).

their new home—was determined to be a wetland subject to the Clean Water Act’s dredge-and-fill permit requirements. Mrs. Sackett had numerous conversations with both EPA and the Army Corps in 2007, trying to determine the basis for the jurisdictional decision. EPA staff informed her that they were discussing the issue with Army Corps staff, but ultimately only the EPA staff made the decision. The Sacketts’ Kafkaesque experience exemplifies the time-intensive confusion and stress that affects many citizens who may not have easy access to legal advice and who may therefore enter into an unfair settlement.

The Boyd family presents a closely related problem. *See supra* section II.A.i.1 (discussing *Smith Farms v. EPA*). As discussed above, the Boyds took substantial steps to ensure the legality of their project. Before beginning any work, they hired a consultant and showed proposed plans to the Army Corps. At the Boyds’ request, the Corps conducted five site inspections of the property. Following the inspections, the Corps raised no objections and informed the Boyds that no permits were required. In reliance of the Corps’ apparent clearance of the project, the Boyds moved to complete the ditch project. It was only after they were finished that EPA swooped in, issued a compliance order, and initiated an administrative penalty proceeding against the family. The family was reasonably surprised. The Boyds learned the hard way what concurrent authority like the EPA’s means for unsuspecting families and businesses.

Second, agencies have also used this overlapping authority to deny regulated individuals the right to judicial review. The Pierce family’s experience is illustrative. As discussed above, in 2010, the family-owned Hawkes Company, a peat moss harvesting business, moved to expand operations to a nearby, state-regulated wetland. But the Army Corps decided that the wetland was a “water of the United States” and fell under its Clean Water Act jurisdiction, because the land had a “significant nexus” to a river over 100 miles away. *See supra* section III.D.i.2. The move imposed severe restrictions on the land and required a years-long and extremely expensive permitting process that would have destroyed the family business. Instead, Hawkes decided to ask a court to review this determination. But when it filed suit, the government argued that the Army Corps’ determination was not judicially reviewable, in part, *because EPA reserved the right to disagree with it*. Hawkes had to take the case all the way to the Supreme Court to obtain a ruling permitting its case to proceed. (And it quickly won on remand after the Supreme Court unanimously agreed the courts could review the determination.)

Third, even when agencies supposedly split power, the dividing lines are not clearly drawn. Consider that EPA possesses permitting authority over point source

discharges and the Army Corps over dredge-and-fill discharges. But, similar to the *Hawkes* case, EPA can veto an Army Corps permit—even after it has been issued. *Marquette County Road Commission v. EPA*, discussed above, is again relevant. In that case, Marquette County sought to build a highway that would have permitted mining trucks to bypass local towns and shorten their routes, saving 500,000 gallons of fuel per year. Pursuant to the Clean Water Act, the Michigan Department of Environmental Quality approved the project, but EPA vetoed the approval with no specific or actionable explanation. As discussed above, the county was ultimately not able to move forward with the safer, more environmentally friendly road. *See supra* section III.D.i.3.

Fourth, agencies sometimes blur the lines even further. Statutorily, EPA possesses enforcement authority over violations of point source permits and for violations of the Act in the absence of a permit. The Army Corps only has enforcement authority for violations of Army issued permits. But the two agencies signed an MOU that not only delegates EPA authority to investigate nonpermit violations to the Army Corps but also EPA's authority to take enforcement action in such cases.

Fifth, the Clean Water Act authorizes only EPA to request that the Department of Justice commence litigation for enforcement of point-source permit violations; the Army Corps may only seek DOJ enforcement for violations of Army-issued permits. However, the Army Corps has notably usurped EPA's authority to refer point-source violations for enforcement. This blurring of authority can make for real-world headaches. It means that, for example, even when EPA declines to take an enforcement action, the Army Corps could take a regulated party to court. That's precisely what happened to PLF client John Duarte in *Duarte Nursery v. Army Corps of Engineers*. *See supra* section III.D.i.2. EPA declined to take enforcement action against him, but the Army Corps elected to do so anyhow.

ii. Reform Proposals

Commonsense solutions can prevent these unfair results. The following six reforms would address the significant due process concerns raised by the multiple-agency issues discussed above.

- 1. Agencies should be prevented from assigning or delegating their enforcement authority**

First, agencies should not assign their enforcement authority to other agencies. Similarly, agencies, such as the Army Corps, should not arrogate to themselves other agencies' authority, such as EPA's ability to refer enforcement cases to DOJ. These actions defy Congress's allocation of power and undermine due process and accountability.

- 2. In cases of overlapping statutory authority, agencies should identify a single lead agency**

Second, where statutes provide agencies with overlapping authority, the agencies should identify a single lead agency with sole authority to make the relevant, factual determinations, with the other agency bound by these decisions. This would prevent multiple investigations with conflicting demands and an unclear lead decision maker, improving both due process and efficiency concerns.

- 3. When agency mandates overlap, there should be a robust process for interagency notification**

The same problem can occur where agencies do not have overlapping authority but their mandates and the activities they regulate do overlap, e.g., the Department of Interior and EPA. In such cases, agencies beginning an investigation should notify all relevant agencies of the case. This alert would function to require those agencies to begin their investigations at the risk of waiving their claims. This would prevent successive investigations over the same conduct.

- 4. Adjudications should be conducted in a single, independent office of adjudication**

Further relief from the problems of multiple and successive enforcement can be obtained by consolidating enforcement actions before a single adjudicator. Rather than housing administrative law judges and administrative judges in separate agencies, the adjudicators can be consolidated within a department-wide or an executive-branch-wide administrative adjudicator office. (An executive-branch adjudicative agency or office might require statutory authorization, but that's not clear to us without further study, especially given the President's longstanding authority and practice regarding the assignment of authority to settle legal disputes between agencies and issue binding

legal opinions within the executive branch to the Attorney General.) Adjudicators with a broader scope and perspective than a bureau or sub-agency might reduce duplicative adjudications but would almost always increase consistency and law-enforcement objectivity.

As discussed above, some of these reforms can be accomplished by agency regulation or presidential orders. Others might more clearly require statutory authorization. Optimally, regulatory adjudicators would be removed from the executive branch entirely and properly appointed to constitute a new Article III court, but similar protections could be obtained by regulatory, presidential, or less-sweeping statutory changes that increase the independence of adjudicators from the agency enforcement chain of command.

5. A modified form of res judicata should be applied in the regulatory context to reduce duplicative proceedings

Adopting a form of res judicata, both as to disputed facts and law, would help address the confusion arising from multiple agency investigations. When an adjudicator or enforcer makes a final factual determination favorable to private parties, regulated individuals ought to be able to rely on that determination going forward, across the executive branch. Agencies therefore ought to be bound by final factual determinations made by other agencies' officials, which highlights the importance of a lead agency designation and other agency roles that are communicated to regulated parties.

Adjudicators currently sit in separate agencies (but see potential reforms immediately above) and usually specialize in different areas of law. It may therefore be more difficult to impose res judicata for a prior adjudicative determination *of law*, but that is still likely possible pursuant to an Executive Order, similar to those previously issued that grant the Attorney General (and through his delegations to the DOJ's Office of Legal Counsel) the authority to decide issues of law for the entire executive branch.

6. Agency veto authority should be limited and subject to immediate judicial review

Finally, where statutes provide an agency a veto over another agency's decisions, the vetoing authority that would disadvantage a regulated party should be constrained by regulation to limited or extreme circumstances. For example, veto power should be permitted only where the initial decision constituted an abuse of discretion. And to

enforce this limitation, vetoes that impair private rights should be subject to immediate judicial review, as described in our reform proposals made in response to Query 11. *See infra* section III.D.ii (describing proposals to ensure that agencies cannot effectively deny judicial review via the imposition of excessive procedural requirements). This would temper the veto power, turning it from an unlimited license to extort additional concessions from enforcement targets, into a reasoned appellate-style authority. This would restore certainty to individuals and small businesses while preserving a check on truly incorrect initial agency decisions.

B. QUERY 7: Do adjudicators sometimes lack independence from the enforcement arm of the agency? What reform(s) would adequately separate functions and guarantee an adjudicator’s independence?

There is frequently a lack of separation between agency investigative and adjudicative functions.

i. Examples of Due Process Shortfalls

In many agencies, investigators can rig the system in their favor through a close relationship with those who make decisions on enforcement actions or with the adjudicators. As discussed previously, in the *Duarte Nursery* case, an Army Corps employee induced his supervisor to issue a cease and desist letter to Mr. Duarte based on a flimsy evidentiary record. The investigator only spoke to Mr. Duarte briefly on the phone and had already reached a conclusion that the property was being illegally “deep ripped,” which wasn’t remotely true. The investigator refused to meet with Mr. Duarte or visit the property. The investigator then selectively received incriminating evidence from an engineering firm that Duarte Nursery was working with. The investigator never sought to identify any exculpatory evidence. As a result, the investigator’s report had several glaring errors.

When Mr. Duarte pointed out these errors and requested additional fact finding under the Freedom of Information Act, the investigator emailed his supervisor and called Mr. Duarte’s request a “ranting fishing expedition” and then “purged” (his words under oath) material from his investigation file to avoid disclosure. The investigator submitted his flawed report to his supervisor and, only four days later, was able to get a cease and desist letter from the head of the regulatory office. At no point was Mr. Duarte given any opportunity to participate in the investigatory process or made aware of the potential charges against him prior to the issuance of the cease and desist order. In this case, a biased investigator tainted the proceeding, and the lack of an

impartial adjudicator meant that Mr. Duarte was not able to contest the allegations made against him.

This problem is not limited to the Army Corps and the Clean Water Act context. In other agencies, the investigators are themselves the adjudicators without even a veneer of separation. For instance, the Commissioners of the Security and Exchange Commission both determine whether to charge a person with a violation of the law and then try the case as administrative judges. In *Flannery v. SEC*, the Commissioners voted to bring charges which were then rejected by an ALJ. The case was appealed to the full Commission which voted narrowly (3-2) to overturn the ALJ and find a violation. The decisive vote was made by one of the Commissioners who initially voted to bring the case. Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. Mich. J.L. Reform 103, 151–53 (2018). See also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1248–49 (1994).²²

²² “Consider the typical enforcement activities of a typical federal agency—for example, of the Federal Trade Commission. The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission’s rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission’s findings warrant an enforcement action, the Commission issues a complaint. The Commission’s complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semi-autonomous Commission administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission. If the Commission ultimately finds a violation, then, and *only* then, the affected private party can appeal to an Article III court. But the agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law.”

ii. Reform Proposals

Where agencies both perform investigations and take administrative enforcement actions, there should be a robust separation of those functions and appropriate due process protections. As such, regulatory reform is necessary to ensure greater due process guarantees in the agency adjudicative and enforcement context. Two potential layers of separation are generally necessary.

1. Those tasked with investigation should be clearly separated from those tasked with making the decision to exercise enforcement power

First, agencies should ensure the appropriate separation between investigators and those making the decision to exercise enforcement power. To further this goal, those exercising administrative enforcement powers should be outside the chain of command of the investigative and prosecutorial staff. The recommendations made to those with enforcement powers should be in writing to allow for accountability. The decisions on administrative enforcement actions should also be in writing, with findings of fact and conclusions of law, and given with adequate particularity. This would ensure that such decisions can be subjected to effective judicial review.

A clear separation of the chain of command would have materially improved due process protections in the *Duarte* case, as it would have prevented a single investigator from coopting the process of bringing an enforcement action. An independent decision-making body would have been more skeptical of the case presented by the investigator and a written record would have allowed for accountability and an opportunity to rebut the basis for the action.

2. Those tasked with prosecution/enforcement of an administrative infraction should be clearly separated from those tasked with adjudication

Second, agencies should ensure an appropriate separation between those tasked with prosecuting or enforcing violations and those who adjudicate claims. One option would be for each agency to have independent adjudicators who report up the chain of command to the agency heads rather than through the same chain of command as the investigators. However, a more enduring solution to the problem of adjudicators lacking independence from agencies would be our proposal made in response to query 2, relating to an independent agency or office of adjudication. Thus, we reiterate

our proposal to create a nonagency specific pool of federal administrative law judges who are not beholden to any particular agency. *See supra* section I.A.ii.4. If this option is pursued, then the agency should arguably not be able to appeal a dismissal by these ALJs, except to an Article III court. Indeed, optimally, these adjudicators themselves would be properly appointed to constitute a new Article III court.

Independent adjudicators or an independent pool of ALJs would have made a difference in many cases, including the *Duarte* case and the *Flannery* SEC enforcement action, since the Commission would not have been able to appeal to itself the dismissed charges.

C. QUERY 10: Are agencies and agency staff accountable to the public in the context of enforcement and adjudications? If not, how can agencies create greater accountability?

There often exists a pronounced lack of accountability in regulatory enforcement actions and adjudications. A particular due process shortfall arises when unelected, unresponsive agency employees—rather than the President or political officers responsible to him—make significant executive decisions. These include enforcement and adjudication decisions, which can have life-changing consequences for individuals. Although such decisions should be made only by those politically accountable to the public, they are routinely made by unaccountable, unresponsive, career civil servants.

The problem is most severe when political officers have wrongly delegated to, or have no effective control over, senior agency employees, such as when agency employees are protected from removal, are not appointed by political appointees, or can make final decisions on behalf of the agency. However, it is not enough for accountable officers to technically have some measure of control over agency employees. There are simply too many agency employees making too many decisions for accountable officers to properly oversee them once decisions are made, and many such officers may worry they will be accused of “politicizing” a decision if they reverse it. Moreover, less scrupulous officers may decide not to exercise significant oversight, finding it beneficial to be able to pass off blame for poor decisions to others, and still others may simply not understand that it is improper for them to delegate their constitutional decision-making authority to career employees.

i. Examples of Due Process Shortfalls

Several recent examples demonstrate the due process shortfalls when unaccountable career civil servants make highly consequential enforcement and adjudication decisions.

1. EPA Environmental Appeals Board

An example of agency employees calling the shots is EPA's Environmental Appeals Board (EAB). The EAB is empowered to make final adjudicatory decisions on administrative appeals under all environmental statutes administered by EPA. This includes all permitting decisions and civil enforcement actions. Notably, not even the EPA Administrator may overturn its decisions. Worse still, the EAB was not created by Congress. Rather, it was unilaterally formed by illegal EPA regulation and empowered by wrongful delegation from the Administrator. This structure empowers those Congress never vested with adjudicatory authority to make highly consequential and binding adjudicatory decisions. Further, it permits the Administrator—in any administration, including future ones—to evade responsibility for decisions that properly are his to make.²³

2. The Food and Drug Administration

A related lack of accountability occurs when any agency official enforces rules that were unconstitutionally promulgated by unaccountable agency employees. This occurs, for example, in the FDA, where the Associate Commissioner for Policy, a long-time career employee with civil-service protections, was unconstitutionally empowered to issue regulations binding on the public under her own authority. A series of such career employees have used this authority to issue 98% of FDA

²³ For a discussion of the constitutionality of the EPA Environmental Appeals Board, see Michael A. Poon, Pacific Legal Foundation, *EPA Appeals Board Is Unconstitutional Without Reform*, The Hill (Jan. 13, 2020), <https://thehill.com/opinion/energy-environment/477788-epa-appeals-board-is-unconstitutional-without-reform>; Michael A. Poon et al., Pacific Legal Foundation, *Comments on Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals* (Jan. 2, 2020), <https://www.regulations.gov/document?D=EPA-HQ-OGC-2019-0406-0024>.

regulations over a 17-year study period, including 1,860 unconstitutional regulations.²⁴ One such illegal rule purported to expand FDA jurisdiction to include vaping products, burdening small businesses with millions of dollars in regulatory expenses and pushing them into bankruptcy and closure.

One of the small businesses that may soon have to close is current PLF client Moose Jooce, which operates two vape shops in Michigan.²⁵ Moose Jooce was founded by Kimberly Manor, after her husband passed away from lung cancer. It caters to long-time smokers who are trying to stop smoking cigarettes, and it has helped hundreds of people quit smoking.²⁶ Another threatened vaping small business is current PLF client Mountain Vapors, which is operated by William Green in Sonora, California. For 30 years, William had smoked two or more packs of cigarettes each day. He was starting to develop emphysema when he tried a vaping pen—and quit smoking the same day. He subsequently opened Mountain Vapors, which particularly caters to people looking to quit smoking. Today, these businesses are on the verge of closing, but the original decision maker for the agency was a career employee with no political accountability.

The risk of these severe consequences for citizens is highest when rule-making, enforcement, and adjudicatory staff are populated by long-time civil servants who have spent their careers in Washington. Political appointees, in contrast, are more sensitive to the experience of everyday Americans, because they are accountable to the people through the President, and to a lesser extent to the Senate, that confirmed their appointment and the rest of Congress that oversees and appoints funds for their

²⁴ Angela Erickson & Thomas Berry, *But Who Rules the Rulemakers: A Study of Illegally Issued Regulations at HHS*, Pacific Legal Foundation (April 2019), <http://bit.ly/2GJJCA8>.

²⁵ *Moose Jooce v. FDA*, No. 20-5048, Document No. 1833124 (D.C. Cir. Mar. 11, 2020) (requesting expedited consideration on appeal because the vaping rule will, by the FDA's own estimation, impose millions of dollars of regulatory costs on the appellants' small businesses in May 2020 and create the very real threat of having to close their businesses).

²⁶ The plight of PLF's vape store clients has been chronicled in the national news media. See Todd Gaziano & Tommy Berry, Opinion, *Career Civil Servants Illegitimately Rule America*, Wall St. J., Feb. 28, 2018, <https://www.wsj.com/articles/career-civil-servants-illegitimately-rule-america-1519862395>.

operations. The Founders understood this, and that's why they crafted the Constitution's Appointments Clause, among other guarantees of democratic accountability.

ii. Reform Proposals

PLF proposes a constitutional solution to combat the due process concerns raised by the rendering of important regulatory enforcement and adjudication decisions by unaccountable career civil servants. This constitutional solution is as follows.

1. Ensure that agencies adhere to the requirements of the Appointments Clause in adjudication and enforcement

The Appointments Clause of the Constitution requires permanent executive officials who wield significant federal power, such as rule-making or adjudication powers, to be appointed using certain procedures. *See* U.S. Const. art. II, § 2, cl. 2. This usually means these officials, known as officers of the United States, have to be nominated by the President and confirmed by the Senate. This process ensures that officers may wield power only after being approved by high-ranking elected officials directly accountable to the people. These elected officials are in turn accountable to the people for their appointments.

For less powerful officers, known as inferior officers, Congress may choose by law to lower the requirements of the Appointments Clause by permitting such officers to be appointed by the President, courts, or heads of departments without Senate confirmation. Congress's role in providing this alternative path is critical, because it allows the reins of the Appointments Clause to be loosened only when the most accountable branch decides it is wise to do so. In addition, when Congress exercises this option, the vast majority of inferior officer appointments are vested in the President and the heads of departments, all of whom remain accountable to the people through the President.

Scrupulous adherence to the requirements of the Appointments Clause can therefore improve accountability of rule-making, enforcement, and adjudicatory staff, addressing the due process shortfall identified above. Agencies must stop relying on unaccountable employees to make final decisions and start returning decision-making power to officers of the United States, as the Constitution and the Founders contemplated.

For the EPA Environmental Appeals Board, this would mean reforming the EAB's appointments procedure so that members are nominated by the President and confirmed by the Senate. Short of that, EPA could maintain accountability and adhere to the Appointments Clause by rendering the EAB's decisions advisory and requiring a properly nominated and confirmed official to make the actual decision. Possible candidates include the EPA General Counsel or the EPA Assistant Administrator for Administration & Resources Management, who oversees EAB.

In the FDA, it would mean stripping the Associate Commissioner for Policy of rule-making power, unless the position by law becomes one requiring nomination and confirmation. If this system had been in place before the vaping rule issued, a politically and thus democratically accountable official would have been the one to consider and issue a rule. Such an official may still have issued the rule, but he would likely have been more sensitive to the rule's impact on small businesses and individuals, making appropriate adjustments.

Harnessing such sensitivities to the people to minimize arbitrary and oppressive governance is the purpose of the Appointments Clause. Administrative agencies and the federal government more generally should vigorously adhere to the Appointments Clause.

V.

CONCLUSION

Growth in the size and scope of the modern administrative state has resulted in an erosion of time-honored due process protections. This is particularly prevalent in the context of regulatory investigations, enforcement actions, and agency adjudication. PLF has witnessed this troubling trend time and again in its representation of clients, who have found themselves in the crosshairs of the administrative state. We are encouraged that OMB is seeking information to improve due process protections in agency investigations, enforcement actions, and adjudications. We are happy to be a resource and will continue to fight until all due process shortcomings are corrected.